



June 5, 2014

President Michael Gottfredson
University of Oregon
Office of the President
1226 University of Oregon
Eugene, Oregon 97403

Sent via U.S. Mail and Facsimile (541-346-3017)

Dear President Gottfredson:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

As an initial matter, FIRE wishes to commend you for signing a recent measure at the University of Oregon (UO) that protects the academic freedom and free speech rights of UO faculty members and students. UO's "Academic Freedom Policy" is a great development for the university's professors and student body, who now enjoy a renewed confidence in exercising their First Amendment rights. FIRE hopes this policy will serve as a model for other colleges and universities. You can find our blog post praising the new policy on our website at <http://www.thefire.org/u-of-oregon-enacts-academic-freedom-policy-for-students-faculty-and-staff>.

In light of the university's admirable and demonstrated commitment to free speech and academic freedom, I write you today to urge you to reform other UO policies to bring them in line with the spirit of the new Academic Freedom Policy as well as with UO's legal and moral obligations, as a public university, under the First Amendment. Specifically, UO's "Overview of Services and Complaint and Grievance Procedures," maintained by the Office of Affirmative Action & Equal Opportunity, and its list of "Examples of Conduct Code Violations," maintained by the Office of the Dean of Students, contain several provisions restricting professors' and students' freedom of speech. Both of these policies earn FIRE's worst, "red light" rating for campus speech codes—a rating reserved for university policies that clearly and substantially restrict speech protected by the First Amendment. (UO also

maintains several “yellow light” speech codes, which we designate as ambiguous policies that could too easily be used to restrict protected expression. A full listing of UO’s current speech codes can be found on our website at <http://www.thefire.org/schools/university-of-oregon>.)

By revising these policies on the heels of adopting the Academic Freedom Policy, UO could truly distinguish itself as a national leader in protecting the free speech rights of students and faculty.

As a starting point, we urge you to revise UO’s two red light policies to bring them in line with the requirements of the First Amendment, and to thus continue the positive momentum created by UO’s academic freedom measure. By doing so, not only will your university remove its two worst restrictions on campus speech, it will signal to students, faculty, alumni, and the general public that UO is a true “marketplace of ideas” where one can speak freely and share views with others. From there, UO can continue its progress by revising its yellow light policies to earn FIRE’s most favorable, “green light” rating—a distinction earned last December by Oregon State University.

We will now review UO’s two red light policies in detail.

Our first concern is with UO’s “Overview of Services and Complaint and Grievance Procedures,” which defines the different types of harassment prohibited at UO. That document states, in relevant part:

Racial Harassment: This is conduct that disparages, ridicules, and/or is physically abusive of a person based on that person’s race.

This overly broad policy regulates the speech rights of UO faculty members by defining racial harassment to include any expression that “disparages” or “ridicules” another person on the basis of his or her race. A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.” *Doe v. University of Michigan*, 721 F. Supp. 852, 864 (E.D. Mich. 1989) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). UO’s policy ignores the fact that much expression that “disparages” or “ridicules” another person, whether on the basis of race or another characteristic, is constitutionally protected. While such discourse may be upsetting to some or even many, a longstanding declaration from the U.S. Supreme Court is instructive here:

Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (internal citation omitted).

Students must, of course, be kept free from conduct that truly deprives them of educational opportunities or the ability to participate in the educational process. To that end, UO has a moral and legal commitment to honor its obligations under federal anti-discrimination law. But this policy goes well beyond addressing such concerns. The policy's terms, on their face, encompass academic discussion of topics such as affirmative action, white supremacy groups, the history of slavery, and much more. A professor addressing one of these issues may be subject to investigation and disciplinary action simply because his or her statements—no matter how germane to the class discussion—subjectively offended a student or were deemed to be “disparaging” or “ridiculing” toward a particular race, either by a complaining student or by a university administrator tasked with enforcing this policy, no matter how unreasonable such a reaction may have been.

At a public university such as UO, professors and students must be free to explore thorny or controversial viewpoints and to engage in robust dialogue and debate. As the Supreme Court has recognized, “speech concerning public affairs is more than self-expression; it is the essence of self-government,” reflecting “our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (internal quotations omitted). UO's policy fails to pass constitutional muster and its overbroad definition of racial harassment must be revised.

Second, UO's list of “Examples of Conduct Code Violations,” reads, in pertinent part:

Harassment: Unreasonable insults, gestures, or abusive words directed to another person that may reasonably cause emotional distress. Example:
Sending an e-mail to a professor using curse words.

This policy violates students' First Amendment rights by prohibiting a great deal of expression that causes “emotional distress.” While UO's policy does incorporate the objective element of “reasonableness,” it is unclear what speech—including “insults, gestures, [and] abusive words”—may be determined to cause “emotional distress.” Given that the latter term is not defined by the policy, students are left uncertain about their speech rights. As such, UO's policy is likely void for vagueness. A policy or regulation is said to be unconstitutionally vague when it does not “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Moreover, the provided example of “[s]ending an e-mail to a professor using curse words” confirms FIRE's concern that this policy restricts protected speech. A public university such as UO simply may not, consistent with its First Amendment obligations, punish a student for the mere use of profanity. Consider the Supreme Court's famous ruling in *Cohen v. California*, 403 U.S. 15 (1971), where the Court overturned, on First Amendment grounds, the conviction of a Vietnam War protestor who was arrested for entering a

courthouse wearing a jacket that bore the words “Fuck the Draft.” Under this precedent, not only does UO’s example of harassment run afoul of the First Amendment, it demonstrates that the policy’s broad prohibition on speech causing “emotional distress” will result in the restriction of protected speech.

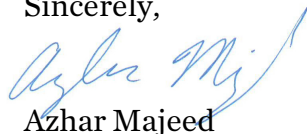
The good news is that the university can easily reform this policy to safeguard campus free speech, as the Supreme Court has set forth a controlling standard for student-on-student (or peer) harassment in the educational setting. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Court held that peer harassment is unwelcome, discriminatory conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” By definition, this includes only extreme and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education.

The Supreme Court’s standard properly balances universities’ obligations to both uphold student speech rights and prevent true harassment. Furthermore, as the Court’s only decision to date regarding the substantive standard for peer harassment in education, *Davis* is controlling on this issue. UO would be well advised, accordingly, to incorporate the Supreme Court’s standard into this and any other policy addressing peer harassment—including its yellow light definition of “Harassment” found in the Student Conduct Code.

Once again, we are hopeful that UO will seize upon the opportunity presented by its recent academic freedom measure to improve its existing speech codes. FIRE would be happy to work with you and your administration toward revising UO’s two red light policies so that the university can improve to an overall yellow light rating. We would also be happy to continue the dialogue from there and work to reform UO’s yellow light policies.

Thank you for your attention and sensitivity to these important concerns. We ask for a response by June 26, 2014. I look forward to hearing from you.

Sincerely,



Azhar Majeed

Director, Individual Rights Education Program

cc:

Penelope Daugherty, Director and Title IX Officer, Office of Affirmative Action & Equal Opportunity

Paul Shang, Assistant Vice President for Student Affairs and Dean of Students